No. 07-600

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# In The Supreme Court of the United States

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**RONALD G. WILKINS,**

*Petitioner,*

**v.**

**UNITED STATES OF AMERICA, ET AL.,**

*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## SUPPLEMENTAL BRIEF

In accordance with Supreme Court Rule 15.8, Petitioner Chaplain (Commander) Ronald Wilkins provides this supplemental brief to inform the Court of Respondents' recent citation to the District Court's and Ninth Circuit's decisions that Wilkins challenges here. Respondents' citation illustrates and supports Wilkins' reasons for granting certiorari.

Wilkins argues that the courts below failed in their duty to "carefully review Establishment Clause challenges," Petition at 14, 16-26, 31-35, and "the Ninth Circuit created a military exception to the Establishment Clause by allowing the District Court to "avoid applying strict scrutiny to an obvious denominational preference." *Id.* 31-35. Wilkins then argued this created a "compelling public interest warrant[ing] this Court's review", *id.* at 40, for several reasons. "The District Court's decision, affirmed by the Ninth Circuit, becomes a precedent for other chaplain's litigation, including a potential class action, currently attacking the same issues Wilkins challenges." *Id.* at 41. Wilkins also argued that "[j]udicial economy would be served and irreparable harm prevented if this Court exercised its supervisory role by clarifying whether the Establishment Clause prohibition against denominational preferences applies to the Navy and by establishing the appropriate standard of review." *Id.* (citing *Adair v. England*, 417 F.Supp.2d 1, 6

(D.D.C. 2006), which refused to apply strict scrutiny to the 26-year denominational preference because of the presumption of regularity).

Respondents cited the decisions challenged here in *Gibson v. U.S. Navy*, 06-cv-1696 (D.D.C.), a potential class action by non-liturgical chaplains challenging the constitutionality of many of the same policies Wilkins challenges here.

**The Background for Gibson**

The plaintiffs in *Gibson, et al., v. U.S. Navy* are 41 non-liturgical chaplains and a chaplain endorsing agency challenging many of the same policies Wilkins challenges, including the 26-year denominational preference granted to Catholics by reserving at least one selection board membership for Catholic chaplains.[1] It was filed in the Northern District of Florida in April 2006 but transferred to the District of Columbia under 28 U.S.C. § 1404(a) and consolidated with the two chaplain suits pending there, *Chaplaincy of Full Gospel Churches v. Winter* (formerly England) (*"CFGC"*), No. 99cv2945, and *Adair v. Winter* (formerly England), No. 00cv0566. The *Gibson* plaintiffs filed a petition in the D.C. Circuit for a writ of mandamus transferring the case back to the Northern District of Florida because the District of Columbia in not a district in which the

[1] Currently there are a total of 65 chaplain plaintiffs and two chaplain endorsing agencies in three lawsuits that have sought judicial review of Navy chaplain practices and policies.

case could have been brought, D.C. Cir. Docket No. 07-5271. The *Gibson* plaintiffs argue that no attorney would file their case in the District of Columbia because of the adverse case law in *CFGC* and *Adair*. Among other issues, they argue that all other Circuits and Districts would apply strict scrutiny to the 26-year denominational preference in accord with *Hernandez v. C.I.R.*, 490 U.S. 680 (1989), while the D.C. District Court has rejected strict scrutiny of the 26-year practice, *Adair v. England*, 417 F.Supp.2d 1, 6 (D.D.C. 2006). *Adair*'s 2006 holding rejected its 2002 holding that "if the plaintiffs can demonstrate after discovery that some or all of the Navy's policies and practices suggest a denominational preference, then the court will apply strict scrutiny to those policies and practices for which plaintiffs have met this initial burden." *Adair v. England*, 217 F.Supp.2d, 7, 14-15 (D.D.C. 2002) (citing *County of Allegheny v. ACLU*, 492 U.S. 573, 608-09 (1989)).

**Respondents' Citation to This Case as Authority**

Taking issue with the *Gibson* Petitioners' argument that all other Districts and Circuits would apply strict scrutiny to the 26-year denominational preference *Gibson* challenges, Respondents cited this case:

> [W]e feel obliged to note the serious inaccuracies of the *Gibson* plaintiffs'

characterization of the relative reception their claims would receive in this and other circuits. The *Gibson* plaintiffs' claim that "[e]very *other* district would apply strict scrutiny" to evaluate their claims is factually incorrect, as the United States District Court for the Southern District of California held that strict scrutiny did not apply to the nearly identical claims brought by a non liturgical Protestant chaplain challenging his involuntary early retirement. A182–A184 (*Wilkins v. United States*, No. 99-CIV-1579-IEG (S.D. Cal. June 29, 2005)). The statement is also mystifying, since the *Gibson* plaintiffs' counsel represented the plaintiff in *Wilkins* and argued on appeal that "The District Court Failed Its Duty to Apply Strict Scrutiny." A200–A201 (*Wilkins v. United States*, No. 05-5363 (9th Cir.) (excerpts from Appellant's Br.)). (The Ninth Circuit rejected that argument in an unpublished disposition. *See Wilkins v. United States*, 232 Fed. Appx. 710 (9th Cir. 2007).)

*In re David Gibson*, D.C. Cir. No. 07-5271, Respondents' 11/8/07 Opposition at 23-24.

Respondents' citation to this case is a perfect illustration of the very reasons Wilkins cites for granting certiorari. Despite the Ninth Circuit's holding that its decision is not precedent, *see Wilkins*, 232 Fed. Appx. 710 n.2, this case remains authority for allowing the Navy's denominational preferences to go unaddressed. *See* Petition at 34, arguing that the District Court's reliance on another district court's faulty reasoning in violation of the Establishment Clause precedent "is a prime example of why this Court's supervisory oversight is not only appropriate but required."

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